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# Ontario Energy Board

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IN THE MATTER OF THE  
ONTARIO ENERGY BOARD ACT

AND IN THE MATTER OF AN  
APPLICATION BY

**UNION GAS LIMITED**

FOR LEAVE TO CONSTRUCT A PIPELINE AND ANCILLARY  
FACILITIES IN THE TOWNSHIP OF WEST NISSOURI IN THE  
COUNTY OF MIDDLESEX AND IN THE TOWNSHIP OF ZORRA  
IN THE COUNTY OF OXFORD.

**E.B.L.O. 234 - PHASE II**

**FURTHER DECISION WITH REASONS**



Pour des renseignements en français, veuillez communiquer  
avec la Commission de l'énergie de l'Ontario.

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(La Commission accepte les appels  
à frais virés.)



E.B.L.O. 234 - Phase II

**IN THE MATTER OF** the Ontario Energy Board Act  
R.S.O. 1980, Chapter 332, and in particular, Sections 30,  
46 and 48 thereof;

**AND IN THE MATTER OF** an Application by Union  
Gas Limited for leave to construct 17.52 kilometres of 48  
inch diameter pipeline and ancillary facilities in the  
Township of West Nissouri in the County of Middlesex  
and in the Township of Zorra in the County of Oxford.

**BEFORE:** C.A. Wolf Jr.,  
Presiding Member


V.W. Bielski, Q.C.  
Member

**PHASE II - FURTHER DECISION WITH REASONS**

April 16, 1991

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**1. INTRODUCTION**

**1.1.0 THE E.B.L.O. 234 - PHASE II DECISION**

1.1.1 On August 31, 1990 the Ontario Energy Board ("the Board" or "the OEB") issued its E.B.L.O. 234 - Phase II Decision with Reasons ("the Phase II Decision") wherein conditional leave to construct was granted to Union Gas Limited ("Union" or "the Company") for the construction of two 48 inch diameter pipeline sections and ancillary facilities between Union's Lobo Compressor Station ("Lobo") and its St. Marys Valve Site ("St. Marys") and between the Company's Milton Tie-In and its Parkway Compressor Station ("Parkway").

1.1.2 The Phase II Decision withheld the granting of leave to construct a third, 17.52 kilometre section of 48 inch diameter pipeline and ancillary facilities ("the St. Marys Section") between Union's St Marys Valve Site and its Beachville Transmission Station ("Beachville").

1.1.3 Each of these pipeline sections are part of the Company's system which transports natural gas between its Dawn Compressor Station near Sarnia ("Dawn") and its Trafalgar Compressor Station in Oakville ("the Dawn-Trafalgar System").



- 1.1.4 With reference to the St. Marys Section, the Phase II Decision stated:

*With regard to the proposed Lobo-Beachville Loop, the Board finds that the Applicant has failed to sufficiently establish the need for the St. Mary's Section of the loop. The Board, therefore, will not grant the Applicant leave to construct the St. Mary's Section until such time as Union can confirm the need to construct this portion of its proposed facilities. Should Union file evidence to confirm the need for the St. Mary's Section by December 31, 1991, the Board is prepared to re-open this hearing for the purpose of testing such evidence. Beyond that date a new application will be required.*

*While withholding leave to construct the St. Mary's Section, pending confirmation of need, the Board finds that, unless there is a significant change in circumstances, the Applicant has successfully demonstrated economic feasibility, and that landowner and environmental concerns regarding this section can be effectively mitigated by compliance with the conditions of approval described in Appendices "A" and "C" of this Decision with Reasons. In the event that this hearing is re-opened to test Union's additional evidence on the need for the St. Mary's Section, the re-opened hearing will, therefore, be limited to only the issue of need.*

## **1.2.0 THE ROCHESTER GAS AND ELECTRIC DIVERSIFICATION**

- 1.2.1 The Rochester Gas and Electric Corporation ("RG&E") is a utility supplying gas in the city of Rochester, New York and neighbouring counties. RG&E is currently supplied with natural gas by CNG Transmission Corporation ("CNG") under a full requirements contract.
- 1.2.2 In 1987 the New York State Public Service Commission ("NYPSC") recommended that RG&E diversify its sources for natural gas supplies. RG&E subsequently finalized an agreement with CNG whereby it may reduce the volumes it purchases from CNG.



- 1.2.3 As part of its diversification strategy, RG&E intends to purchase natural gas from other suppliers in the United States and in western Canada.

**The Diversified Gas Supply Route**

- 1.2.4 A portion of RG&E's diversified gas supply is to be delivered by ANR Pipeline Company ("ANR") to Great Lakes Transmission Company ("Great Lakes") at St. Clair, Michigan.
- 1.2.5 The gas is then to be transferred by Great Lakes to TransCanada PipeLines Limited ("TCPL") at the international boarder at St. Clair, Michigan for importation into Canada and subsequent delivery to Union at Dawn.
- 1.2.6 Union is to transport the gas on its Dawn-Trafalgar System for redelivery to TCPL at its interconnection with TCPL at Union's Kirkwall Valve Site ("Kirkwall"). To do so, Union stated that it needs to install the St. Marys Section.
- 1.2.7 The gas is then to be carried on TCPL's pipeline from Kirkwall to the United States border at Chippawa, Ontario. To do so, TCPL will need to construct a 20 kilometre pipeline ("the Blackhorse extension") between its Blackhorse Sales Meter Station and a proposed interconnection with Empire State Pipeline ("Empire") at Chippawa.
- 1.2.8 Empire is then to re-import the gas into the United States at Grand Island, New York, and carry it to a proposed interconnection with RG&E at Rochester, New York.

**Regulatory Approvals Along the Route**

- 1.2.9 In order for the diversified gas supply to reach RG&E, a number of regulatory approvals are required for the movement of the gas and the construction of new facilities along the route:

1. approval of the United States Department of Energy ("DOE") Office of Fossil Energy for the export and import of the gas out of, and into the United States, (on March 19, 1991 RG&E received DOE's approval, conditioned on the acceptance of an environmental assessment by the United States Federal Energy Regulatory Commission ("FERC"));
2. approval by the OEB for the construction of additional facilities on Union's Dawn-Trafalgar System (these facilities, i.e. the St. Marys Section, are the subject of this proceeding);
3. approval by the National Energy Board of Canada ("the NEB") for TCPL to construct the Blackhorse extension and to install additional compression, (TCPL filed an Application with the NEB on July 20, 1989, and the NEB has scheduled a hearing of that Application for April 22, 1991);
4. acceptance by FERC of the environmental assessment of the river crossing between Chippawa and Grand Island, (FERC is currently in the process of conducting an environmental assessment, and RG&E expects a ruling by late spring 1991);
5. the granting of an import and export licence by the NEB, (RG&E re-filed a Section 116 Application with the NEB on January 8, 1991 and, due to the rather routine nature of such applications, RG&E does not anticipate any problems);
6. receipt of a United States Presidential Permit and approval from FERC authorizing the interconnection of Empire's facilities with TCPL's Blackhorse extension, (Empire filed the required Applications on December 4, 1989 and action is expected to be coincident with the completion of FERC's environmental assessment in late spring 1991);



7. receipt of a NYPSC Certificate of Environmental Compatibility and Public Need authorizing the construction of Empire's facilities, (Empire received the required Section VII certification from the NYPSC on March 1, 1991); and
8. RG&E's filing with the NYPSC, its engineering and construction plans, for the interconnection with Empire in Rochester, thirty days prior to commencing construction, (Formal NYPSC approval for the interconnection is not required due to the proximity (800 feet) of the RG&E and Empire pipelines).

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DECISION WITH REASONS

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**2. THE APPLICATION AND HEARING**

**2.1.0 THE APPLICATION**

2.1.1 On January 10, 1991 Union advised the Board in writing that it had entered into a firm service contract agreement with RG&E for the transportation of 2,876  $10^3\text{m}^3$  per day of gas on its Dawn-Trafalgar System, commencing November 1, 1991. Union further advised that this incremental transportation demand would require the construction of the 17.52 kilometre section of 48 inch diameter pipeline between St. Marys and Beachville.

2.1.2 Union filed a signed contract and agreements that it had entered into with RG&E, and claimed it could now demonstrate the need for this section of pipeline, and thereby meet the remaining requirement of the Phase II Decision for the Board to grant leave to construct the St. Marys Section. Accordingly, Union asked that the Board reopen the E.B.L.O. 234-Phase II hearing to hear its evidence on the need for the St. Marys Section.

**2.2.0 THE HEARING**

2.2.1 In accordance with its findings in the Phase II Decision, and pursuant to Section 30 of The Ontario Energy Board Act ("the Act"), the Board reopened the E.B.L.O. 234 - Phase II hearing on April 2, 1991 in London, Ontario ("the reopened hearing"). The evidentiary portion of the reopened hearing and the submission of oral arguments were concluded on that same day.

2.2.2 Copies of the verbatim transcript and all exhibits in the reopened hearing are available at the Board's offices for public review.

2.2.3 While the Board has considered all the evidence and submissions in making its findings in this proceeding, it has summarized only the determinant or contentious issues in this Further Decision with Reasons.

**Appearances**

2.2.4 The following appearances were registered in the reopened hearing:

Union	Burton Kellock, Q.C.
Board Staff	Jennifer Lea
CNG	James Smellie
The Consumers' Gas Company Ltd. ("Consumers Gas")	Peter Atkinson



## **Witnesses**

2.2.5 Union called the following witnesses:

Mark W. Stiers	Co-ordinator, Storage and Transportation Services, Union
Richard T. Jones	Intermediate Transmission Planning Engineer, Union
Dennis J. Sugumele	Manager, Gas Supply Services, RG&E

2.2.6 None of the other parties called witnesses at the reopened hearing.

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DECISION WITH REASONS

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**3. NEED FOR THE ST. MARYS SECTION**

- 3.0.1 As stated in the Phase II Decision, the Board found that, unless there is a significant change in circumstances, the only requirement of Union is that it demonstrate the need for the St. Marys Section, before leave to construct could be granted for this pipeline loop.

**3.1.0 THE UNION/RG&E CONTRACTS**

- 3.1.1 Union filed two contracts that had been entered into between the Company and RG&E. The first of these was a Transportation Service Contract dated March 29, 1990, together with an Amending Agreement dated August 27, 1990 and a Letter Agreement dated October 1, 1990. The second was a Construction Indemnity Agreement dated September 30, 1990, plus two associated Amending Agreements dated November 30, 1990 and February 28, 1991.
- 3.1.2 The Transportation Service Contract specifies a maximum contract demand of  $2,876 \times 10^3 \text{m}^3$  per day for firm transportation on the Dawn-Trafalgar System. RG&E testified that it was liable for demand charges for that volume under Union's Rate M12. The commencement date for firm service under this contract was amended to be November 1, 1991, and the term of the contract is for 15 years from that date.

- 3.1.3 The Transportation Service Contract, as amended, contains as conditions precedent, that the regulatory approvals described in Chapter 1 of this Further Decision with Reasons be obtained prior to July 1, 1991.
- 3.1.4 Two additional conditions precedent in the amended contract are:
- that Union complete construction of any facilities necessary to provide the contracted transportation service by November 1, 1992, and provide RG&E with written notice of the completion of such facilities; and
  - that Union receive OEB approval for the inclusion of the Transportation Service Contract in a Union rate schedule by November 1, 1992.
- 3.1.5 Under the Construction Indemnity Agreement, RG&E indemnified Union for certain of its capital and carrying costs in order to allow the Company to pre-purchase pipe and other hardware so as to not jeopardize the November 1, 1991 in-service date for the required new facilities.
- 3.1.6 RG&E has entered into agreements with ANR, Great Lakes and TCPL for firm transportation service for its gas. RG&E's Transportation Service Contract with Union is to be assigned to TCPL once obligations commence under this contract.
- 3.2.0 SYSTEM DEMAND/CAPACITY**
- 3.2.1 Union testified that the capacity of the Dawn-Trafalgar System had been enhanced since the filing of its evidence in the E.B.L.O. 234-Phase II hearing. This resulted from a more flexible mechanism governing an exchange agreement between Consumers Gas and TCPL. This exchange agreement allows Union to deliver up to 5,666 10<sup>3</sup>m<sup>3</sup> per day of gas assigned to Consumers Gas to Kirkwall rather than to Parkway.

- 3.2.2 Under the current conditions and forecasts, Union's evidence indicated that, for the 1991/1992 winter peak day, the capacity of the Dawn-Trafalgar System, without the St. Marys Section in place, would be 84,869  $10^3\text{m}^3$  per day. If the St. Marys Section is constructed, this capacity would increase to 86,201  $10^3\text{m}^3$  per day.
- 3.2.3 Union's evidence showed that demand on the Dawn-Trafalgar System for the 1991/1992 winter peak day, including RG&E's demand of 2,876  $10^3\text{m}^3$  per day, will be 85,841  $10^3\text{m}^3$  per day.
- 3.2.4 Thus, Union claimed that, if the St. Marys Section is not constructed, there will be a 1991/1992 winter peak day shortfall of 972  $10^3\text{m}^3$  per day at Kirkwall. With the St. Marys Section in place, requirements at Kirkwall would just be met, and there would be a surplus capacity of 360  $10^3\text{m}^3$  per day at Parkway.
- 3.2.5 Union acknowledged that the St. Marys Section could be shortened to eliminate the surplus, but that this would require installing a major valve station with the capability of equalizing the pressures between the various pipelines in the Dawn-Trafalgar System. Since the Beachville Valve Station already possesses these capabilities, the Company maintained that it would be impractical to shorten the St. Marys Section and install duplicate valving.



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DECISION WITH REASONS

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**4. CONDITIONS OF APPROVAL**

4.0.1 In its Phase II Decision the Board indicated that, barring a change in circumstances, the granting of leave to construct the St. Marys Section would be subject to the same conditions that were applied to the pipelines that were approved in that Decision.

4.0.2 Union maintained that there has been no significant change to the circumstances that prevailed at the time of the Phase II Decision and, therefore, all that is now required is that Union demonstrate the need for the St. Marys Section. The Company argued that it would be inappropriate to now seek to modify the Phase II Decision's conditions of approval.

4.0.3 Board Staff and Consumers Gas submitted that two of the conditions of approval specified in the Phase II Decision should be revisited.

**4.1.0 REGULATORY APPROVALS**

4.1.1 Appendix A of the Phase II Decision contains the following condition of approval ("Condition (m)"):

*Union shall verify, in writing, to the Board Secretary that all necessary regulatory and government approvals have been obtained before commencing construction of the facilities for which leave to construct has been granted.*

4.1.2 Consumers Gas submitted, and Union agreed, that Condition (m) be amended to indicate that the scope of this condition was intended to include both United States and Canadian approvals.

4.1.3 Board Staff called attention to paragraph 7.5.1 of the Phase II Decision where, under the heading of "Common Issues", the Board found as follows:

*The Board is cognizant that there is some uncertainty surrounding the intended exports of natural gas which, to a large measure, underpin the need for the facilities proposed in the Application which are the subject of these proceedings. Therefore, as a general condition of approval, applicable to the granting of leave to construct any of the sections of the currently proposed facilities, the Board requires that Union shall, within 30 days prior to the start of construction, confirm in writing to the Board Secretary that the contracts and letters of agreement filed in these proceedings remain in full force and effect, and that the pre-construction conditions precedent contained in these documents have been fulfilled.*

4.1.4 Board Staff argued that Condition (m) should be expanded to include the requirements stated above.

4.1.5 Board Staff further argued that, as a condition of granting leave to construct the St. Marys Section, Union should be required to file with the Board any amendments that are made to its contract with RG&E prior to the commencement of construction.

4.1.6 Consumers Gas and CNG endorsed the changes to Condition (m) which Board Staff proposed.

4.1.7 Union did not take issue with the substance of the proposed changes to Condition (m). However, it did argue that the Board's directive in paragraph 7.5.1 of the Phase II Decision was unclear when it stated "...



Union shall, within 30 days prior to the start of construction, confirm in writing to the Board Secretary ...". Union asked the Board to clarify its meaning so as to avoid the potential for future disputes.

**4.2.0            TERMINATION DATE**

4.2.1            The Phase II Decision contains a further Condition of approval ("Condition I") which states:

*The Leave to Construct granted herein terminates December 31, 1991, unless otherwise ordered by the Board.*

4.2.2            Board Staff expressed concern that the St. Marys Section might be constructed during the (wet) winter season and cause excessive environmental damage. Board Staff argued that, in the Phase II proceedings, Union had clearly stated its intention to construct between May and October in the (dry) summer months; and that the landowners and the Board had assumed that this would be done.

4.2.3            In its submissions, Board Staff suggested that Union ought to be barred from constructing in the winter, and that the termination date for leave to construct the St. Marys Section could be maintained as December 31, 1991 or advanced to November 1, 1991.

4.2.4            Board Staff further submitted that Union should be precluded from back-filling the topsoil over the pipeline trench during (wet) winter conditions. It pointed to the fact that Union had, on at least one prior occasion, left the excavated soils piled on the right-of-way until the spring, rather than conduct restoration work in the winter.

- 4.2.5 Board Staff categorized the "construction" that should be avoided during the (wet) winter months as being any activity that involved the use of heavy machinery.
- 4.2.6 Union argued that the termination of a leave to construct order does not prohibit it from continuing any construction activity that had been initiated prior to the termination date. Union contended that the termination date identifies the date after which construction cannot commence.
- 4.2.7 The Company argued that the construction of a pipeline involves all necessary work, including backfilling and restoring the land, and that it is not limited to the laying of the pipe. Thus, since restoration, for example, may go on for years, Union maintained that the termination date in a leave to construct order did not require that all construction activity must cease as of that date. Union noted that the statute is not of much help when, in Section 1 of the Act it states that: "'construct' means construct, reconstruct, relocate, enlarge or extend".
- 4.2.8 Union re-affirmed that it plans and prefers to construct in the summer. However, it stated that this might not always be possible, and that the Board recognized this when, in the Phase II Decision, the Board said:
- The Board accepts Union's commitment to its stated policy to avoid construction during wet weather conditions, if at all possible ...*
- At the same time, Union's equally valid concern would be that the failure to complete the construction on schedule could result in gas shortages, thereby affecting the safety and well-being of the public.*
- 4.2.9 Union concluded that the question of construction during the winter should not be revisited in this case since: the record is incomplete; reliance would largely have to be on untested assumptions; and there would be no

input from the interested parties who were not represented at the reopened hearing.

- 4.2.10 Consumers Gas maintained that a termination date prohibited continued construction and did not, as Union claimed, specify only the date after which construction could not commence. In support of its position, Consumers Gas cited the Board's E.B.L.O. 234 Phase I Decision wherein the Board stated:

*The Board is of the opinion that conditioning its approval on the commencement day for construction would be too vague in that protracted construction schedules could result in the Board's approval extending to a time when circumstances might have undergone substantial changes ...*

- 4.2.11 Consumers Gas further cited the Board's finding in the Phase II Decision which stated:

*The Board finds that, in substance, the Conditions of Approval, which were imposed in the Phase I Hearing, are equally appropriate with regard to the facilities under consideration in Phase II of these proceedings.*

- 4.2.12 Consumers Gas, therefore, argued that Condition 1 should be maintained, and that Union should be required to apply to the Board for a further order extending the termination date, if construction cannot be completed by that time. According to Consumers Gas, such an application would require that notice be given to interested parties, many of whom would never have contemplated the possibility of winter construction.

- 4.2.13 When making submissions with regard to "construction", Consumers Gas explained that it was not including land reclamation or other activities that follow the in-service date for a pipeline.



- 4.2.14 Both CNG and Consumers Gas submitted that the construction of a pipeline should be scheduled as closely as possible to the date when the added capacity is needed. Union stated that having a pipeline installed months in advance of the time when it was needed would also not make economic sense for Union.
- 4.2.15 The Company's witnesses stated that, while their interest in achieving an in-service date of November 1, 1991 was genuine, a delay until November 1, 1992 would not nullify their agreements, and the only penalty that would accrue to Union, if such a delay were encountered, would be a loss of forecast revenue.
- 4.2.16 Union's evidence indicated that, should the planned capacity increase requested by RG&E not be in place on November 1, 1991, and should it be assigned to a third party, construction of the St. Marys Section would then be scheduled to commence on June 1, 1992 in order to meet a November 1, 1992 in-service date.

**5.           BOARD FINDINGS**

5.0.1           The Board emphasizes that this proceeding is a reopening of the E.B.L.O. 234 - Phase II hearing and, as such, the evidence brought forward in that earlier hearing constitutes part of the record in this proceeding.

**5.1.0           NEED FOR THE ST. MARYS SECTION**

5.1.1           Union's evidence demonstrates that construction of the St. Marys Section is required in order to avoid a shortfall in the capacity of its Dawn-Trafalgar System for the 1991/1992 winter peak day.

5.1.2           The contract and agreements that were filed confirm RG&E's transportation requirements as being credible and of a long-term nature. RG&E's commitment to be liable for demand charges under its contract with Union indicates that the Company's existing customers will be shielded from the need to bear the costs of the unutilized capacity on the St. Marys Section.

5.1.3           The Board accepts Union's evidence with regard to need. In light of the above factors, and recognizing that none of the parties challenged Union's submissions regarding need, the Board finds that, through its evidence in this reopened hearing and the associated earlier hearings, Union has established that the construction of the St. Marys Section is in the public interest.

**5.2.0 CONDITIONS OF APPROVAL**

- 5.2.1 In keeping with its findings in the Phase II Decision, the Board finds that the granting of leave to construct the St. Marys Section shall be conditioned upon Union's satisfying the conditions of approval contained as Appendices A and C of that Decision, as modified hereinafter.

**Regulatory Approval**

- 5.2.2 The Board concurs with the submissions of the parties, and requires that Union shall verify in writing to the Board Secretary that all necessary United States and Canadian regulatory and government approvals have been obtained before commencing construction of the St. Marys Section, and Condition (m) has been amended accordingly.
- 5.2.3 The Board notes Union's agreement to the substance of this change to Condition (m).
- 5.2.4 Considering that RG&E's demand, which underpins the need to construct the St. Marys Section is part of, and dependent on, a much broader series of undertakings, the Board concurs with Board Staff, Consumers Gas and CNG that it is appropriate to assure that the RG&E/Union contract and agreements remain in full force and effect, and that there have been no substantial changes to the contract or the agreements in the interim between the granting of leave to construct and the start of the construction of the St. Marys Section.
- 5.2.5 The Board therefore, as a condition of approval, requires that Union shall, in writing, confirm that the current contract and agreements remain in full force and effect, and inform the Board Secretary forthwith should there be any changes to the arrangements between Union and RG&E regarding the transportation of gas destined for RG&E on the Dawn-Trafalgar System.



The Board, therefore, further amends Condition (m) of Appendix A to this effect.

5.2.6 The Board notes Union's concern over the wording of paragraph 7.5.1 of the Phase II Decision. It was the Board's intention that, in order to avoid reliance on outdated information, Union should confirm in writing to the Board Secretary the status of its contractual arrangements and the status of the required regulatory and government approvals thirty days prior to the commencement of construction. The Board, however, acknowledges that circumstances could arise wherein outstanding deficiencies might only be resolved close to the date of the commencement of construction.

5.2.7 The Board is content to rely on Condition (m) as amended, to assure that construction of the St. Marys Section will not be premature. The Board, therefore, will not require that Union submit the 30 day advance notice, as described in paragraph 7.5.1 of the Phase II Decision.

#### **Termination Date**

5.2.8 The Board notes that the testimony and evidence in the E.B.L.O. Phase II hearing is replete with references to the environmental damages that are caused when pipelines are constructed during wet weather or in the winter, such as was the case with the Interprovincial pipeline which was described in the E.B.L.O. 234 - Phase II hearing as having permanently scarred some of the lands in the Dawn-Trafalgar corridor.

5.2.9 The Board finds that there is sufficient evidence to substantiate the need to avoid winter construction, and that winter construction was not envisioned when the conditions of approval were defined in the Phase II Decision.

5.2.10 The Board further finds that, should winter construction be projected for the St. Marys Section, this would constitute a significant change in

circumstances as referenced in the Board's Phase II Decision's findings regarding the St. Marys Section.

- 5.2.11 The Board notes that the July 1, 1991 deadline for satisfying the conditions precedent in the Union/RG&E agreement is beyond the "late May" commencement date that Union originally proposed, in its E.B.L.O. 234 - Phase II evidence, to allow for a November 1, 1991 in-service date. July 1 is also later in the year than the June 1 commencement date identified in the Union/RG&E agreement, regarding construction for a third party.
- 5.2.12 The Board is also concerned that the complexity of the larger undertaking, which encompasses the need for the St. Marys Section, could cause regulatory or other delays which might prompt winter construction.
- 5.2.13 The Board notes that the date for the satisfaction of the conditions precedent in the March 29, 1990 RG&E/Union Transportation Service Contract, as amended on August 27, 1990, September 30, 1990 and February 28, 1991, requires that Union complete construction of the subject facilities on or before November 1, 1992.
- 5.2.14 Considering all the above factors, the Board concludes that the likelihood that construction will be carried on after November 1, 1991, and potentially during the 1991/1992 winter season, is substantially higher than it was at the time of the E.B.L.O. 234 - Phase II hearing and Decision.
- 5.2.15 The Board, therefore, finds that there has been a significant change in circumstances since the issuance of the Phase II Decision. In the Board's opinion the potential for environmental damage has been significantly increased.
- 5.2.16 In an attempt to assure that environmental damage is held to a minimum, the Board directs that Union shall not commence or continue construction activities beyond November 1, 1991 without first obtaining additional leave

of the Board. This restriction shall in no way relieve Union of the responsibility to use its proper judgement when deciding if, or when, the existence or anticipation of wet, or winter, weather conditions indicates that construction should cease or be postponed prior to the termination date.

- 5.2.17 The Board, revises Condition (l) to specify November 1, 1991 as the termination date for leave to construct the St. Marys Section, unless otherwise ordered by the Board prior to that date.

#### **Other Matters**

- 5.2.18 The Board considers its finding in its E.B.L.O. 234 - Phase I Decision, as cited by Consumers Gas, to be clear. However, the Board restates that neither shall construction commence nor shall it continue after the termination date specified in the Board's leave to construct order.

- 5.2.19 The Board, however, appreciates that the term "construct" or "construction", as used above, may be subject to misinterpretation. The Board views the "construction" of a pipeline as being those activities required to lay the pipe and to safely put it in service. The Board considers that while back-filling and land reclamation are activities associated with the construction of a pipeline, they are not in the Board's view, "construction" processes per se, and the Board points to Conditions (b) and (i) of Appendix A as indications that this concept has long been accepted. Thus, while Union is to be constrained from "constructing" the St. Marys Section after November 1, 1991, this prohibition does not preclude Union from delaying the back-filling of topsoil until dry conditions are again encountered, nor does the prohibition preclude conducting land restoration activities after the termination date.

- 5.2.20 The Board concurs with Board Staff that Union should avoid back-filling topsoil over the pipeline trench during (wet) winter conditions. The Board



notes that, in the past, Union has preferred to allow topsoil to remain piled on the easement until the spring, rather than back-fill during wet weather or in the winter. The Board endorses this practice and views this procedure as being consistent with Union's policy to refrain from causing avoidable environmental damage.

5.2.21 Since avoiding back-filling during wet or winter weather conditions is seen to be encompassed by Union's existing policy, the Board will not specifically require that the Company do so as a condition of approval. However, the Board expects that Union will apply such procedures whenever it is appropriate to do so.

5.2.22 The Board does not require that a separate Selection Committee be formed, as described in Appendix C of the Phase II Decision, to oversee the construction of the St. Marys Section. The Board assumes that overseeing this section will be accommodated as an addition to the existing responsibilities of the Committee involved in the Phase II construction. Should the Middlesex-Oxford Landowners Committee and Association ("MOLCA"), or its designated representative on the existing Selection Committee, be unwilling to undertake this responsibility, Appendix C shall cease to be in effect with regard to the St. Marys Section. In such an event, the Selection Committee's Chairman shall, in writing, inform the Board Secretary of MOLCA's decision not to participate, and shall provide copies of his transmittal to both Union and MOLCA. While the Board values MOLCA's participation, should it decide not to be active on a Selection Committee dealing with the St. Marys Section, the Board will accept such a decision without prejudice to MOLCA's other dealings with the Board.

**6. COMPLETION OF THE PROCEEDINGS**

**6.1.0 LEAVE TO CONSTRUCT**

6.1.1 The Board finds that Union has successfully demonstrated the need for, and the economic feasibility of, the proposed section of 48 inch pipeline between the Company's St. Marys Valve Site and its Beachville Transmission Station. The Board expects that Union's compliance with the Conditions of Approval described in Appendix A of this Further Decision with Reasons will avoid undue hardship to affected landowners and avoid significant lasting damage to the environment.

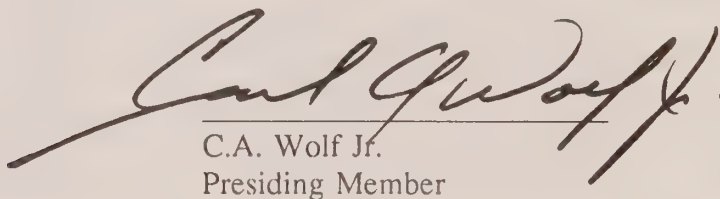
6.1.2 The Board, therefore, grants Union leave to construct the St. Marys Section of pipeline, subject to the Company's compliance with the Conditions of Approval in Appendix A and, if agreed to by the full Phase II Selection Committee, the conditions described in Appendix C appended hereto. The Board will, in due course, issue its Order granting this leave to construct.

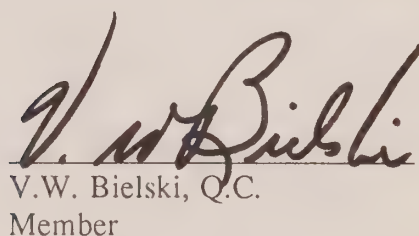
**6.2.0 COSTS**

6.2.1 None of the parties to the rehearing requested an award of costs. The Board, therefore, finds that each party shall bear its own costs of participating in this proceeding.

6.2.2 The Board directs that Union shall pay the Board's costs incurred in this hearing. The Board will in due course issue its Cost Order to this effect, and Union shall pay these costs forthwith upon receipt of said Order.

DATED AT Toronto April 16, 1991.

  
C.A. Wolf Jr.  
Presiding Member

  
V.W. Bielski, Q.C.  
Member



APPENDIX "A"

E.B.L.O. 234 CONDITIONS OF APPROVAL

ST. MARYS SECTION

- a) Subject to Condition (b), Union shall comply with the conditions imposed by the Board, and with all commitments made by its counsel and witnesses, and shall construct the pipeline and shall restore the land according to the evidence of its witnesses at this hearing.
- b) Union shall advise the Board's designated representative of any proposed change in construction or restoration procedures and, except in an emergency, Union shall not make such change without prior approval of the Board's designated representative. In the event of an emergency, the Board's designated representative shall be informed forthwith after the fact.
- c) Union shall furnish the Board's designated representative with every reasonable facility for ascertaining whether the work has been, and is being, performed according to the Board's Order.
- d) Union shall give the Board's designated representative and the Chairman of the Ontario Pipeline Coordinating Committee 10 days written notice of the commencement of construction of the pipeline.
- e) Union shall designate one of its employees as project engineer who will be responsible for the fulfilment of conditions and undertakings on the construction site. Union shall provide the name of the project engineer to the Board's designated representative. Union shall prepare a list of the conditions imposed by the Board, and the undertakings



given by its counsel and witnesses during the hearing, and provide it to the Board's designated representative for verification, and to the project engineer for compliance during construction.

- f) Union shall file with the Board's designated representative notice of the date on which the installed pipeline was tested, within one month after the test date.
- g) Both during and after the construction, Union shall monitor the effects upon the lands and the environment, and shall file ten copies of both an interim and a final monitoring report with the Board's designated representative and simultaneously provide a copy of each report to every landowner on the pipeline route. The interim monitoring report shall be filed within six months of the in-service date and the final monitoring report within 15 months of the in-service date.
- h) The interim report shall describe the implementation of Conditions (a) and (b), if any, and shall include a description of the effects noted during the construction and the actions taken or to be taken to prevent or mitigate any long-term effects of the construction upon the environment. This report shall describe any outstanding concerns of landowners.
- i) The final monitoring report shall describe the condition of the rehabilitated right-of-way and actions taken subsequent to the interim report. The results of the monitoring programs and analysis shall be included, and recommendations made as appropriate. Further, the final report shall include a breakdown of external costs incurred to-date for the authorized project, with items of cost associated with particular environmental measures delineated and identified as pre-construction related, construction related and restoration related. Any deficiency in compliance with undertakings shall be explained.





- j) Union shall file with the Board's designated representative "as-built" drawings of the pipeline; such drawings shall indicate any change in route alignment.
- k) Within 12 months of the in-service date, Union shall file with the Board's designated representative a Post Construction Financial Report. The Report shall indicate the actual capital costs of the project and shall explain all significant variances from the estimates adduced in the hearing.
- l) The Leave to Construct granted herein terminates November 1, 1991, unless otherwise ordered by the Board.
- m) Union shall, prior to the start of construction, confirm in writing to the Board Secretary that the contract and agreements filed in the reopened hearing are in full force and effect, and that the pre-construction conditions precedent, including the need to obtain the specified United States and Canadian regulatory and government approvals, have been fulfilled. Should these contracts or agreements be amended, modified or supplanted in any way, Union shall, in writing, forthwith advise the Board Secretary of the nature and substance of such changes.
- n) Union shall implement the communication procedure, approved by the Board as part of Phase I of these proceedings, in order to reasonably guarantee that landowners will have rapid access to a senior manager at all times when there is a dispute over the construction decisions of Union's field representatives. A clear written description of the procedure, including contact names and the steps to be taken shall be approved by the Board's designated representative and provided to all affected landowners prior to commencing construction of the pipeline.



- o) Union shall append to its interim and final monitoring reports a log of all landowner complaints that have been received during construction. Such logs shall record the times of all complaint-related communications between Union and the landowners; the substance of each complaint; the actions taken in response; and the reasons underlying such actions.
- p) The Board's designated representative for the purposes of these conditions shall be the Board's Project Manager, Environmental.





APPENDIX "C"  
THE SELECTION COMMITTEE/INDEPENDENT INSPECTOR

As a further Condition of Approval in granting leave to construct the facilities applied for in Phase II of the E.B.L.O. 234 proceeding, the Board requires the following:

1. In advance of the start of construction, Union shall meet with designated representatives from MOLCA and from the Board to form a 3 member "Selection Committee" for the purposes of selecting one or more mutually acceptable environmental inspector(s) to be present, on an ongoing basis, at the site(s) during the construction of the facilities which are the subject of Phase II of Union's E.B.L.O. 234 Application.
  - (a) The participation of the MOLCA representative on this Selection Committee shall be compensable by Union at a prudent rate to be agreed upon between MOLCA and Union, notwithstanding Union's obligation to defend this rate when it appears before the Board in its next rates case.
  - (b) The Board's representative on the Selection Committee shall be designated as the Committee's Chairperson, and shall have the casting vote in the event that MOLCA and Union are unable to agree on the selection and number of environmental inspector(s), or any other matter properly before the Selection Committee.
2. The selected environmental inspector(s) shall submit regular written reports of the inspector(s)' observations and opinions prior to, during and subsequent to the construction of the subject facilities. The



frequency, timing and scope of said reports shall be defined by the Selection Committee.

3. The reports of the environmental inspector(s) shall be submitted simultaneously and directly to the three members of the Selection Committee. Such reports shall not be subjected to review or editing by any member of the Selection Committee, or their sponsor organizations, prior to their submission.
4. The terms and conditions governing the hiring of the selected environmental inspector(s), and the duties to be performed, shall be developed and approved by the Selection Committee, in keeping with the Board's findings in the E.B.L.O. 234 - Phase II Decision with Reasons, prior to the commitment for said inspector(s)' services. Said inspector(s) shall be accountable to the Selection Committee for his/her conduct during the inspector(s)' tenure.
5. Union shall be liable for the costs of, and reasonably incurred by, said inspector(s) in the performance of his/her duties, without prejudice to the Board's ultimate responsibility to judge the prudence of such incurred costs as part of the Board's rate-making mandate.
6. MOLCA and Union shall forthwith resolve the question of the compensation to be offered by Union to the MOLCA representative on the Selection Committee, and both MOLCA and Union shall submit the names of their Selection Committee representatives to the Board Secretary within thirty (30) business days of the issuance of this Decision with Reasons. Should either MOLCA or Union fail to identify their representative within the prescribed time, the Selection Committee shall be formed as a two member Committee. In such a case, the Board's appointed representative shall again act as the Committee's Chairperson, and shall have the casting vote in the event





that agreement can not be reached between the two Committee members.

7. Should both MOLCA and Union fail to identify their representatives to the Board Secretary within the allowed time, the Board will interpret this as a rejection, by both parties, of the need for independent inspection. In such a case, the Board's findings in this matter, and the condition of approval as contained in this Appendix "C", shall cease to have effect, and the Board shall promptly so notify all parties to these Phase II E.B.L.O. 234 proceedings.
8. Should a separate "Joint Impact Management Committee" be instituted, as agreed to by Union in its undertakings, the Selection Committee shall be the senior committee with the authority to reserve such duties and responsibilities unto itself as may flow from the Board's findings related to the need for independent inspection.
9. The Board's representative on the Selection Committee shall be the Board's Project Manager, Environmental, or if circumstances so require, such other representative as may be appointed by the Board's Chairman.







